

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : 15-CR-637(KAM)

Plaintiff , :

-against- : United States Courthouse
Brooklyn, New York

MARTIN SHKRELI and
EVAN GREEBEL, :

Defendant. : January 26, 2017
2:00 o'clock p.m.

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TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE KIYO MATSUMOTO
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

For the Government: ROBERT L. CAPERS
United States Attorney
BY: ALIXANDRA SMITH
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For Defendant Shkreli: ANDREA L. ZELLAN, ESQ.
MARC A. AGNIFILO, ESQ.

For Defendant Greebel: LISA H. RUBIN, ESQ.
REED M. BRODSKY, ESQ.

Also Present: GLENN McGORTY
ARLEN PYENSON
(For M. Biestek)

IAN SHAPIRO
NICHOLAS FLATH
(For Retrophin)

1 APPEARANCES: (Continued)

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5 Proceedings recorded by mechanical stenography, transcript
6 produced by computer-aided transcription.

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9 THE CLERK: This is criminal status conference.
10 15CR637. USA versus Martin Shkreli and Evan Greebel.

11 Will the U.S. Attorneys please state your
12 appearances, please.

13 MS. SMITH: Good afternoon. Alixandra Smith,
14 Winston Paes, Jacqueline Kasulis and Karthik Srinivasan for
15 the United States.

16 THE COURT: Good afternoon.

17 THE CLERK: And on behalf of Mr. Shkreli?

18 MS. ZELLAN: Andrea Zellan, Marc Agnifilo and Teny
19 Geragos for Mr. Shkreli.

20 THE COURT: Good afternoon.

21 THE CLERK: And on behalf of Mr. Greebel?

22 MS. RUBIN: Good afternoon, Your Honor. Lisa Rubin
23 and Reed Brodsky for Evan Greebel.

24 MR. BRODSKY: Good afternoon, Your Honor.

25 THE COURT: Good afternoon.

1 I have various correspondence from the parties. It
2 appears you have been working well to exchange privilege logs
3 and documents and I'm hoping that review is well underway. I
4 was wondering whether the defendant still anticipated bringing
5 severance motions.

6 MS. ZELLAN: Yes, Your Honor, we do.

7 THE COURT: All right. So, the schedule that you
8 had proposed is still in force and we will start, I guess,
9 seeing your submission soon.

10 MS. ZELLAN: Yes, we'll be submitting by the 17th.

11 THE COURT: And will Mr. Greebel be submitting as
12 well?

13 MS. RUBIN: Yes, Your Honor.

14 MR. BRODSKY: With respect to the scheduling, we did
15 notice that the oral argument is set for April 7th. The
16 briefing is done by March 7th.

17 We believe we have a very strong basis for
18 severance, obviously, and if there's any ability, Your Honor,
19 to move up the date of the oral argument if Your Honor looks
20 at the case law and agrees with us with respect to severance,
21 what we wanted to do is avoid a situation of preparing for
22 trial, you know, really getting ready for trial and then Your
23 Honor severs the case and then Mr. Greebel would then be tried
24 in October and then we would get ready for the case again in
25 the fall. So we're just trying to eliminate some of the work

1 to conserve resources.

2 THE COURT: I appreciate that. I have a lot of
3 matters in March.

4 MR. BRODSKY: Understood, Your Honor.

5 THE COURT: Okay. Thanks.

6 MR. BRODSKY: Thank you, Your Honor.

7 THE COURT: And if we can move it up, we will let
8 you know but, obviously, when we move something, we have to
9 coordinate with many other lawyers, your colleagues at the end
10 of the table, the other end of the table.

11 MR. BRODSKY: I understand.

12 THE COURT: So, it's not a minor matter to move
13 dates and these are dates that I think had been proposed.

14 MR. BRODSKY: We had proposed a little bit earlier
15 for oral argument but we understand your schedule is busy in
16 March, Your Honor.

17 THE COURT: Okay. If we have the opportunity, we
18 will but, otherwise, you know, I'd like to stick with this
19 schedule.

20 MR. BRODSKY: Very well, Your Honor.

21 THE COURT: Is there anything else we should
22 address? I think there was also an issue of other motions
23 that the parties may anticipate regarding disputes on the
24 privileged documents.

25 MS. SMITH: Yes, Your Honor. From the government's

1 perspective, it's our understanding that Mr. Shkreli has not
2 yet decided whether or not he's going to advance an advice of
3 counsel defense. If he does, then obviously the documents
4 will no longer be privileged because he'll need to waive to
5 advance that defense.

6 So, we anticipate, once that decision is made, if
7 they're not advancing an advice of counsel defense, at that
8 point, we would kind of brief for Your Honor any challenges we
9 have to the privilege doing and we're happy to do that on that
10 second briefing schedule, particularly because it's our
11 understanding that the advice of counsel decision will
12 probably go hand in hand with motions for severance.

13 THE COURT: All right. So Roman numeral two of
14 paragraph two, is that right?

15 MS. SMITH: Roman numeral three.

16 THE COURT: Three. All right.

17 MS. SMITH: So, I think any challenges to the
18 privilege log, if there are any to be made, would be in that
19 last round.

20 THE COURT: All right. Do you anticipate having any
21 issues regarding privileges at this point?

22 MS. ZELLAN: Your Honor, are you asking with respect
23 to Retrophin's assertions of privilege?

24 THE COURT: Yes, and just any discussions that all
25 the parties have had and the nonparties.

1 MS. ZELLAN: I think that we're working well with
2 the people who are representing Retrophin. There have been
3 some discussions about some expansion of the waiver to include
4 some documents that are currently on the privileged log. I'm
5 optimistic that we can work together to resolve those issues
6 and not seek intervention of the Court and at that point, you
7 know, if we can't resolve it, then I think we'll do the same
8 as the government has proposed which is get that into a motion
9 for the Court in that second briefing schedule.

10 THE COURT: All right. Does Retrophin wish to be
11 heard?

12 Yes, Mr. Brodsky.

13 MR. BRODSKY: Yes, Your Honor. We are conferring,
14 meeting and conferring with counsel for Retrophin at Cooley
15 with respect to the privilege logs.

16 For scheduling purposes, Your Honor, we do
17 anticipate filing a motion to compel Retrophin to produce
18 documents pursuant to subject matter waiver pursuant to using
19 the privilege as a sword and a shield. I can get into it now,
20 but we do anticipate for scheduling purposes making such a
21 motion.

22 THE COURT: And you are committing to the schedule
23 in the Court's order?

24 MR. BRODSKY: Absolutely, Your Honor. In fact, I
25 would anticipate we're going to do it in advance of that --

1 THE COURT: All right.

2 MR. BRODSKY: -- schedule.

3 THE COURT: In terms of oral argument for these
4 other motions that don't have to do with the severance, will
5 the parties be prepared to argue on April 7th since they are
6 going to be briefing these motions in advance of that date?

7 MR. BRODSKY: I think the reply briefs are due on
8 April 10th, Your Honor, with respect to all nonsubstantive --

9 THE COURT: Well, do we want to move that date up?

10 MS. SMITH: That's fine with the government.

11 THE COURT: We can move up those dates for all the
12 motions that are anticipated to be brought under paragraph
13 two, Roman numeral three.

14 MR. BRODSKY: The issue, Your Honor, respectfully,
15 is that we tried to stage it so that we would be prepared
16 fully with the severance motion which is a -- we're working on
17 it now. It is going to take another month for us to work on.
18 It is a very substantial motion and we do anticipate a few
19 other motions, but with respect to our motion to compel, we
20 can inform Your Honor we can move that date up. We will move
21 to compel Retrophin to produce documents pursuant to subject
22 matter waiver and sword and the shield way in advance of
23 March 17th.

24 THE COURT: All right. So might you be ready to
25 argue on that motion on April 7th?

1 MR. BRODSKY: Oh, absolutely. With respect to that
2 motion, in fact, we may be able to argue it much more in
3 advance of that.

4 THE COURT: All right. Well, we will see how this
5 unfolds. Obviously, I would prefer it if the parties would
6 confer as much as possible and resolve any issues, you know,
7 and avoid a lot of motion practice that may not be necessary
8 if you would really try to speak to one another.

9 MR. BRODSKY: We conferred regarding the issue of
10 subject matter waiver with Retrophin's counsel at Cooley and
11 as we anticipated, they completely rejected our view. They
12 also rejected the sword and the shield argument. So, we, we
13 are conferring regarding the privilege logs. Unfortunately,
14 with respect to this issue, we don't see much, much ability to
15 confer about it.

16 THE COURT: Is your client being sued in their
17 lawsuit though? Isn't it just against Mr. Shkreli?

18 MR. BRODSKY: Well, with respect to the issue of
19 subject matter waiver, they waived with respect to just
20 communications with respect to Katten. So when they, in or
21 about the summer of 2015, decided to waive the privilege, they
22 did it on the narrow basis of saying we'll waive these subject
23 matters but only with respect to our communications with this
24 law firm. So, if they have other communications that are
25 privileged on that subject, it's our view, under the

1 well-established case law, that you can't decide to waive the
2 subject matter of privilege and decide to do it with this
3 lawyer or this law firm. You waive the subject matter
4 entirely.

5 In addition, with respect to sword and the shield, I
6 think Your Honor made some comments during a conference in
7 December that there's well established case law you cannot use
8 the privilege as a sword and a shield and Retrophin has done
9 so. So we do believe we have standing with respect to, with
10 respect to that issue.

11 THE COURT: Well, that was in the context of the
12 lawsuit against Mr. Shkreli. I didn't understand that they
13 were also suing Mr. Greebel.

14 Is Retrophin suing Mr. Greebel?

15 MR. BRODSKY: They are not suing Mr. Greebel.

16 THE COURT: So, where is the use of the sword
17 against your client?

18 MR. BRODSKY: In three respects. We believe even if
19 you sue Mr. Shkreli with respect to using it as the sword and
20 the shield, you waive your privilege in that regard. So --

21 THE COURT: Well, that's the subject matter waiver.

22 MR. BRODSKY: Correct.

23 Second, Your Honor, if you use an internal
24 investigation, and they did an internal investigation, you
25 disclose your findings to the public and you disclose your

1 findings to other third parties, we believe that you've waived
2 your privilege. So we have evidence that they disclosed
3 information, for example, to auditors with respect to their
4 internal investigation and we believe as a result of that,
5 they waive a privilege. They can't assert privilege to that.

6 So, those are the areas that we'll be seeking a
7 privileged waiver.

8 THE COURT: Auditors that they hired or auditors
9 that were brought in by the government or auditors --

10 MR. BRODSKY: They're external auditors. Retrophin
11 had external auditors.

12 THE COURT: So, you are saying when a corporation
13 hires external auditors to do an audit, that that disclosure
14 of information to somebody that is working really to audit the
15 corporate books and records, that constitutes a waiver and a
16 public disclosure?

17 MR. BRODSKY: No. I believe that if you have
18 findings of an internal investigation and you convey that, for
19 example, to your external auditor and you give them that
20 information, for example, Marcum was the external auditor who
21 audited the books of Retrophin, it is well established there
22 is no privilege between the public company and the external
23 auditors.

24 So, if you disclose something to your external
25 auditor about your financial statements or about your

1 disclosures of an internal investigation, there is no
2 privilege relationship and the auditor, the external auditor,
3 for example, Markham if subpoenaed, would produce that
4 information or testify about it because there's no privilege.
5 So, there are circumstances like that in this case where
6 disclosures were made both to the public and, for example, to
7 external auditors.

8 THE COURT: But that is not the sword and shield
9 argument again, right?

10 MR. BRODSKY: It depends how you -- if you're using
11 the internal investigation to disclose a portion of what's
12 privileged and to hold back other portions, then that would
13 be, in effect, the sword and the shield where you're using
14 information gathered, gathered pursuant to a privileged
15 communication, and I'll give you an example, Your Honor.

16 Judge Gardephe recently in a case in the Southern
17 District of New York found that a company had conducted an
18 internal investigation and went to the government and
19 disclosed conversations they had with witnesses, and
20 conversations they had on the work they did on the
21 investigation. Judge Gardephe found that that completely
22 waived the privilege with respect to the nature of their
23 investigation. Once they went to the government and they made
24 certain disclosures to the government -- in this case, it was
25 the SEC -- then they waived communications with all of that

1 subject.

2 So, we believe even though it may not be in the
3 nature of a lawsuit, if you use the privilege as a sword, for
4 example, you take information to the government and you
5 disclose it to them, you can no longer protect that
6 information. If you take the information and you disclose it
7 to your external auditor, you can no longer then use the
8 privilege to withhold the information. So that would be our
9 basis.

10 THE COURT: All right. Well, I am sure Retrophin's
11 attorney will have something to say about that.

12 You do not have to do it now.

13 MR. SHAPIRO: When the time comes, we'll respond.

14 THE COURT: Yes.

15 So, we will get that briefing and you know what our
16 briefing schedule is, sir. The motions will be served on
17 March 17th. Oppositions on March 31st.

18 MR. SHAPIRO: I see it, yes.

19 THE COURT: All right. Any other motions
20 anticipated besides what we have heard so far, the
21 government's motions and the defense motions?

22 MR. BRODSKY: Your Honor, if it helps things with
23 scheduling because I know you have a busy March, we can move
24 up our motion to compel Retrophin to produce documents on
25 subject matter waiver next week, for example, and you can move

1 up the schedule for Retrophin to respond so that it's all
2 briefed and argued before March, if that's helpful to your
3 schedule, Your Honor.

4 THE COURT: Does that work for Retrophin?

5 MR. SHAPIRO: Based on my own scheduling, I much
6 prefer the schedule that's in the scheduling order to respond
7 to what sounds like what's going to be a substantial motion so
8 I would rather stick with the existing schedule.

9 THE COURT: I think his severance motion is going to
10 be substantial. I did not get a sense that this other motion
11 would be too complicated.

12 MR. BRODSKY: I would estimate, Your Honor, 15 to
13 20 pages. It's not -- this is not a complicated area of the
14 law with respect to the use of privilege.

15 THE COURT: All right. Well, since Retrophin is
16 sort of caught here as a non-party, I think I would prefer to
17 accommodate their schedule on this.

18 MR. BRODSKY: Very well, Your Honor.

19 THE COURT: It will make our burden harder because
20 we will have many more motions to deal with in this time
21 frame. I mean, if you find, sir, that you will be able to
22 accommodate a more, advance a schedule at all, I would
23 appreciate it.

24 MR. SHAPIRO: Understood, Your Honor.

25 THE COURT: Okay. Is there anything else we should

1 address at this time?

2 MS. SMITH: No, Your Honor.

3 THE COURT: All right. I guess then the next
4 schedule date for me is April 7th unless folks have a need to
5 come in before.

6 Does anybody anticipate needing to come to court
7 before then?

8 MS. ZELLAN: No, Your Honor.

9 MS. SMITH: No, Your Honor.

10 THE COURT: What time do we have on April 7th?

11 THE CLERK: 1:30 p.m.

12 THE COURT: All right. Thank you. I will see you
13 April 7th at 1:30 then.

14 MR. BRODSKY: Thank you, Your Honor.

15 MS. ZELLAN: Thank you.

16 MS. SMITH: Thank you.

17 (Matter concluded.)

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22 I certify that the foregoing is a correct transcript from the
23 record of proceedings in the above-entitled matter.

24 /s/ Charleane M. Heading

February 27, 2017

25 CHARLEANE M. HEADING

DATE